(L)
Level 3
Communications

October 15, 1998

RECEIVED

OCT 15 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket 98-141

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of Comments of Level 3 Communications, Inc. In Opposition to Application For Transfer of Control.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the postage pre-paid envelope provided. If you have any questions regarding this filing please contact me at 402/536-3624.

Sincerely,

Terence J. Ferguson /ta

Terence J. Ferguson

TJF/ta
enclosures

No. of Copies rec'd 0+10
List ABCDE

255933.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
OCT 15 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses	)	
Section 214 Authorizations from	)	CC Docket 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee		

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL

Terence J. Ferguson
Senior Vice President and Special Counsel
Level 3 Communications, Inc.
3555 Farnum Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel)

October 15, 1998

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. The asserted public benefit of the merger lies in the claim that the combined companies will bring serious competition for the first time to the local exchange market, by competing in each other's home region as well as in the home regions of the other incumbent ILECs. It is asserted that SBC/Ameritech will enter the home region of Bell Atlantic/GTE, which will retaliate by entering SBC/Ameritech's home region; that both will enter the home regions of the remaining ILECs; and that in the resulting competition of the two giants, consumers will benefit.

This scenario is questionable. When two firms dominate a market, they are not likely to attack each other's market share, out of fear that the other will retaliate and in the ensuing battle neither side will gain sufficiently to offset the risk and expense of the fight. It may well be that SBC/Ameritech and Bell Atlantic/GTE will compete with each other for large business customers – because that is a segment of the local exchange market where other firms are beginning to provide significant competition. Indeed SBC and Ameritech concede that the principal aim of their plan to compete out-of-region is to target such customers, precisely because, if they do not, other carriers will take that business. But that would only bring additional competition to a market segment <u>where other carriers have already begun to compete</u>. In the market for small and medium business and residential customers – where additional competition is most needed – the most likely scenario is that the two giants will find it less risky and much more profitable to arrive at a tacit mutual non-aggression pact, both sitting on their own dominant market share and leaving the other undisturbed.

2. SBC and Ameritech already have sufficient financial and managerial resources to compete in the local markets out-of-region. Indeed, Ameritech has already made one serious competitive foray into the St. Louis market, where it has significant brand-name recognition and a large customer base. Both Ameritech and SBC have also planned other out-of-region competitive initiatives. The merger would have the anticompetitive effect of removing each company as a potential competitor in the other's region.

3. In addition, the merger will have an anticompetitive effect by spreading SBC's "stonewall" corporate culture to the Ameritech region. SBC has a long history of anticompetitive practices in Texas. PacTel's competitive record changed for the worse when SBC took over; and there is at least one instance in which SBC took an anticompetitive stance and Ameritech a procompetitive stance on the same issue. There can be no doubt that SBC management will dominate the combined company, and will bring with it a hardened attitude toward competition in the region.

4. It has been suggested that the merger should be approved with conditions. This approach would be ineffective. Merger conditions have been ignored in the past, and once the merger is approved, effective enforcement of the conditions would be extraordinarily difficult. Merger conditions would be subject to the all the problems that have plagued other market-opening measures, which will remain limited and ineffective

so long as the incumbent's underlying incentive to exploit the bottleneck remains intact. What is needed is a decision by the Commission not to approve this merger (or others like it) unless the parties to the merger undertake an adequate structural solution to the underlying problem – such as divestiture of the local loops to an independent company, or an "independent system operator" that would manage the loop facilities but not own them.

5. In the event, however, that the merger is approved, stringent market-opening conditions are essential, with effective penalties for non-compliance.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses	)	
Section 214 Authorizations from	)	CC Docket 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee		

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL

Level 3 Communications, Inc. ("Level 3") is a communications and information services company that is building an advanced Internet Protocol technology-based network across the U.S., connecting 50 cities. Level 3's network is scheduled to be completed in phases by 2001. The company also plans to build local networks in 50 cities across the country and to interconnect these city networks with its national long distance network. Level 3 plans to begin providing services in as many as 15 major U.S. cities by the end of 1998, leasing local and interstate facilities until such time as sections of its network are constructed and can replace leased lines.

DISCUSSION

This merger is part of a trend which, if continued, will lead the country to a local telephone market dominated by only two or three Bell behemoths. Indeed, if this merger and the Bell Atlantic-GTE merger are approved, the two combined companies will control together over two-thirds of the access lines in this country.[1] Before allowing this trend to go any further, the Commission must carefully weigh its anticompetitive effects and must be convinced that there are public benefits outweighing such effects.

It has been said that "[t]he local phone companies have figured out that it is better for their shareholders to combine with each other than to accept the risks and the expense of getting into price wars, building new facilities and providing lots of new services through their networks."[2] It is time for the Commission to make it clear that the merger route is no longer an acceptable means for the Bell giants to obtain new customers. If they are to expand out-of-region, it must be through competition, not acquisition.

---

1 SBC has 33 million access lines. SBC Communications, Inc., Form 10-K filed March 13, 1998, at p. 5. Ameritech has 20.5 million access lines. Ameritech Corp., Form 10-K filed March 13, 1998, at p. 2. Bell Atlantic and GTE combined will have 63 million access lines. "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998, http://www.gte.com/g/news/gtebell.html (visited Oct. 9, 1998). As of July 1, 1997, the total number of access lines was 154.5 million (qualified USF loops of billed carriers contributing to the Universal Service Fund). Trends in Telephone Service, Common Carrier Bureau, Industry Analysis Division (Feb. 1998) at Table 8.2, pp.112-114 and n. a.

2 "Giant Telecom Deal Bets Against Free-For All Theory – SBC Strategy involves Grabbing As Many Local Users As Possible," The Arizona Republic, May 12, 1998 at A2, 1998 WL 7770971, quoting Ken McGee of the Gartner Group, Inc.

I. SBC's CLAIM THAT THE MERGER WILL ENABLE IT TO PURSUE A NATIONAL STRATEGY OF LOCAL COMPETITION OUT-OF-REGION IS NOT CREDIBLE.

A. SBC/Ameritech is not likely to compete against other ILECs except in market segments where competition already exists.

SBC's principal claim of public benefit is that the merger is necessary to enable it to pursue a national strategy of entering out-of-region local exchange markets. That claim is not credible, for several reasons.

The claim assumes that in order to be large enough to compete in out-of-region local market, an ILEC must be so large that it controls, as SBC/Ameritech would do, one-third of the access lines in the country. If that premise is correct (and we show below that it is not), then by definition the end result must be a telecommunications market dominated by two or three mega-ILECs. Indeed, with the proposed merger of Bell Atlantic and GTE, that is exactly where this merger will take us. And if these mergers take place, it is hard to believe that the remaining ILECs will remain independent for long.

The Supreme Court has recognized that, as a market becomes dominated by fewer and fewer companies, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States v. Aluminum Company of America*, 377 U.S. 281, 280 (1964). "With only a few sellers will come the increasing awareness that parallel business behavior might be feasible." *United States v. Falstaff Brewing Corporation*, 410 U.S. 526, 551 (1973) (Marshall, J., concurring). In a local exchange market dominated by two or three giant companies, each with approximately a third of the market, each company is likely to conclude that it is to their "mutual advantage" not to compete but to arrive at a tacit mutual non-aggression pact, as each realizes that attempting to wrest customers from the other will lead to retaliation, which will in turn precipitate an expensive competitive fight causing losses to both sides.[3]

Of course, mutual non-aggression between two or three mega-ILECs will not work if other companies are competing for a substantial share of the business. The Commission has recently found that "there are a large number of firms that actually compete or have the potential to compete in [the larger business] market." *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. No. 97-211, Memorandum Opinion and Order (rel. Sep. 14, 1998), ¶ 173. It may well be that in this

---

[3] This phenomenon has been explained by Prof. Dennis Carlton, SBC's economic expert. Prof. Carlton posits a small town with two gas stations directly across the street from each other, with no other competition and no possibility of further entry, selling the same gas with the same capacity and quality of product. He concludes that the stations will not compete:

> Each realizes that it cannot steal customers from its competitor before its competitor can respond. And the competitor will respond because it is more profitable to match the price cut and share the market at a lower price than to permit the price-cutting station to steal market share. Each station should rationally anticipate immediate matching and, therefore, not cut price in the first instance. Cooperative pricing is thus a logical outcome of the "game" without any secret meetings or addition communication.

Carlton, Gertner and Rosenfield, "Communication Among Competitors: Game Theory and Antitrust," 5 GEO. MASON L. REV. 423, 428 (1997). Of course, in the case of two or three mega-ILECs, tacit non-aggression would take the form of a geographical division of markets rather than maintenance of a uniform price. But the same analysis applies.

market, the presence of other significant competitors will force the mega-ILECs to compete against each other.

But there is no reason to believe that the mega-ILECs will go beyond markets that are already competitive or becoming so, and initiate competition in markets for medium or small business and residential customers. In these markets, the tacit-nonaggression that characterizes markets dominated by two or three firms of approximately equal size is likely to prevail.

There is a particularly strong reason to believe that the local exchange market for residential and medium and small business customers is one in which mutual non-aggression will prevail among a small number of mega-ILECs. These are market segments in which other significant competition does not exist. Moreover, these are markets in which product lines are reasonably uniform, pricing is transparent and "cheating" is difficult. In the local exchange market, "cheating" on a tacit nonaggression pact would be very difficult, particularly for small and medium business and residential customers. Each mega-ILEC will know when its rival is seeking collocation in areas dominated by small business and residential customers; it will know when its rival offers packages designed to appeal to that market segment; and it will know whenever its customers switch. Thus any attempt by a mega-ILEC to expand out-of-region beyond the larger business market will be detected immediately and bring swift retaliation. In these circumstances, tacit mutual non-aggression is likely to prevail.[4]

---

[4] Prof. Carlton has explained the difference between markets where pricing is transparent and "cheating" on a tacit non-aggression pact would be difficult, and a

In short, local exchange competition between mega-ILECs is likely to occur only in the larger business customer segment of the market, where significant other competition is beginning to emerge in any event. The best the Commission can hope for from the mega-ILECs is "me-too" competition. Since the mega-ILECs are unlikely to be "ice-breakers," bringing competition to markets that would not otherwise become competitive, the promised benefits of the SBC-Ameritech merger are indeed slim.

Indeed, the merger may lessen, rather than enhance, the chances that the ILECs will ever compete against each other in markets where significant competition has not otherwise developed. The merger of SBC and Ameritech, in combination with the merger of Bell Atlantic and GTE, will reduce the number of significant ILECs from six to four, and may well lead to further combinations. That, in turn, will enhance the chances of tacit agreement not to compete in each other's region. "[A]s the number of firms

---

market where transactions are individually negotiated and "cheating" would be easy:

> Compare the outcome in the gas station example with the two major auto dealers in the same town. Although list prices of cars may be observable by rivals, since each sale involves significant interactions between the seller and the buyer, the possibility of negotiated prices is real. It becomes impossible for competitors to determine a rival's transaction prices and therefor, it becomes difficult to ascertain whether or not a rival is undercutting a cooperative price. Since it is difficult to detect cheating, it becomes more difficult to enforce cooperative pricing. For example, a seller may mistakenly believe when its sales decline that a rival has undercut price and may respond with a price cut of its own.

5 GEO. MASON L. REV. at 432-33. Again, while the example concerns price cutting, the analysis applies as well to geographical division of markets among mega-ILECs. It would be very easy for the incumbent to know when a mega-ILEC from another region is planning to "cheat" by competing for its residential or small and medium business customers. In this respect, that segment of the local exchange market is analogous to Prof. Carlton's gas stations, rather than his auto dealers.

increases, collusive agreements are more difficult to police, and the frequency of cheating and noncooperative behavior increases." Samuelson and Nordhaus, Economics (16th ed.) at 176. Conversely, as the number of firms decreases, tacit collusion becomes more likely. By countenancing a progressive reduction in the number of ILECs, the Commission is simply increasing the chances that each will be satisfied, in those segments of the market where non-ILEC competition has not been significant, simply to sit on its own dominant market share and refrain from expensive and risky retaliatory fights with the other ILECs.

SBC's own description of its plan for out-of-region local competition confirms what economic analysis suggests – that the mega-ILECs will not be likely to compete with each other in market segments other than the large business segment where significant competition from non-ILECs has begun to develop. SBC admits that the primary focus of its strategy is "the thousand largest companies in the United States," particularly those with principal offices within SBC's region which are already taking service from SBC. Kahan Aff't ¶ 30.[5] "The core of the National-Local Strategy is the conclusion that SBC must develop the capability to compete for the business of large national and global customers both in-region and out-of-region." Kahan Aff't ¶ 13.

---

[5] We note that at other parts of its presentation, SBC analyzes its strategy in terms of targeting the Fortune 500 companies. Carlton Aff't ¶ ¶ 25-29 and Table 1.

B. SBC has not shown that it needs to merge in order to obtain the resources to compete out-of-region.

SBC is already a huge company. It has approximately 33 million access lines. It serves the nation's two most populous states, California and Texas, as well as 7 of the country's 10 largest metropolitan areas.[6] Its 1997 revenues were $24.8 billion ($26.8 billion if SNET's 1997 revenues are added), and its 1997 operating income was over $3 billion.[7] Its revenues and net income are already comparable to the companies it claims it must compete with: MCIWorldCom ($27 billion/$500 million); Sprint ($15 billion/$1 billion); Bell Atlantic ($30 billion/$2.5 billion); BellSouth ($21 billion/$3.3 billion); GTE ($23 billion/$2.8 billion); and France Telecom ($27 billion/$2.5 billion). SBC Brief at 53 n.67.

SBC points out that, without the merger, its revenues and income will lag behind AT&T/TCG ($51 billion/$4.6 billion), and its revenues (but not its income) will lag behind Nippon Telephone ($77 billion/$2.4 billion) and Deutsche Telekom ($39 billion/$2 billion). Id. But the latter two companies lack name recognition in the local market, as well as managerial and technical experience, both of which the Commission has recognized as essential for a company to be a significant competitor in the local exchange market. Bell Atlantic-NYNEX, ¶ ¶ 106, 107. And while AT&T has a recognized brand name and

---

[6] SBC Communications, Inc., Form 10-K filed March 3, 1998, "Business Operations."

[7] SBC Communications, Inc., 1997 Annual Report at 31.

exceeds SBC in terms of revenues and income, SBC has not shown that AT&T has made significant inroads in its local exchange business.[8]

SBC says that its first realization of the need to become larger was the announcement of the MCI/WorldCom merger; at that point, SBC says, it realized that it had to compete with companies of that size for the business of its large corporate customers, both within and without its region. Kahan Aff. ¶ 10. But SBC has already achieved the size of MCIWorldCom; its revenues are at about the same level as MCIWorldCom's, and its net income is higher. Moreover, it has far more managerial and technical experience in local exchange markets. In terms of financial and managerial resources, there is no reason why SBC cannot start competing with MCIWorldCom (and other companies of similar size) without any further mergers.

SBC says its out-of-region local exchange strategy will require more than $2 billion in capital expenditure, plus operating expenses over the next ten years in excess of $23.5 billion. Kahan Aff't ¶ ¶ 57, 58. But SBC's shareholders are paying a merger premium of approximately $13 billion. Kahan Aff't ¶ 83. That sum alone would go a long way towards meeting what SBC says are the financial requirements for effective out-of-region local competition. The public interest would be better served if that sum were spent on such competition directly, rather than paid out as a premium for a merger.

---

[8] Furthermore, if a merger could be justified solely on the ground that the applicant faces one potential competitor that is larger, then every merger would have to be approved until there are only two carriers left in the market.

Moreover, SBC presents a powerful argument for why it will have to compete for local business outside its region even without the merger. SBC argues that in today's more competitive environment, if it and Ameritech do not follow their current large business customers to out-of-region locations, other competitors will take their in-region business from these customers. Kahan Aff. ¶ 10. These customers represent the "profitable core" of SBC's business. Brief at 49. With competitive carriers such as MCIWorldCom attacking its high-end corporate business, SBC says it concluded that a strategy confined to its own region was "no longer viable for SBC." Kahan Aff. ¶ 22. As SBC explains, "[w]e cannot remain idle while our competitors capture the huge traffic volumes generated by a relatively small number of larger customers." Kahan Aff't ¶ 13. Rather than lose its large business customers to "financially strong, technically capable, fully integrated national and global competitors," SBC states that it has decided to become one of those competitors. Kahan Aff. ¶ 23.

But since SBC alone is already comparable in size to the competitors it says are threatening its core business, it will have to counterattack by competing out-of-region regardless of whether it merges.

C. Even in the large business segment of the local exchange market, the premise of SBC's planned out-of-region campaign is questionable.

The fundamental premise of SBC's strategy for out-of-region local competition is that large businesses are looking for a single provider for their telecommunications needs. The argument is that only with the merger will SBC reach a "critical mass" in terms of business customers in out-of-region large cities who have main offices within SBC's region and therefore will want to sign up with SBC for their out-of-region locations.

But this premise is flawed. As one company official described its strategy for purchasing telecommunications services, "[w]e are never going to give everything to one company. That way, they always want to be nice because they want the rest of your business."[9] Sprint has pointed out that "almost every Fortune 500 company today buys some long distance telephone service from three or four carriers. They manage us as vendors and force us to compete against each other for the opportunity to get more business."[10]

Moreover, in the market for small business and residential customers, brand-name recognition is crucial, and the merger will not give SBC significant out-of-region brand-name recognition. In addition, to reach small and medium businesses and residential customers, SBC admits that its own facilities will have to be supplemented by "extensive utilization of unbundled network elements, primarily local loops." Kahan Aff't ¶ 39. The massive size of the post-merger SBC will not help to overcome the obstacles that smaller CLECs have encountered in this area. The Commission is well aware of the history of incumbent ILECs' entrenched and persistent resistance to utilization of

---

9 "Hanging Up on the Bells," Wall Street Journal Sep. 21, 1998, at R13, quoting Richard A. Smith, Director of Technical and Network Services for Methodist Health Systems.

10 Public Utilities Commission of Ohio, *Joint Application of SBC and Ameritech for Approval of a Change of Control*, No. 98-1082-TP-AMT, Informational Forum. August 26, 1998, Remarks of John R. Hoffman, Sprint Corp.

unbundled networks by competitive carriers, despite the requirements of the Telecommunications Act of 1996. Indeed, as we describe in more detail in Point II below, SBC itself has one of the worst record of any ILEC in this regard. If another incumbent LEC regards SBC/Ameritech as a more serious potential competitor than the smaller CLECs it has previously been resisting, it will have an increased incentive to raise obstacles in the path of its utilization of unbundled network elements.

In short, SBC is asking the Commission to approve the creation of a giant company, with significant anticompetitive potential, because of a prediction that only with this merger will there be significant local competition. But such enhanced local competition is likely, if at all, only for larger business customers where significant competition is beginning to develop from other companies. In other segments of the market, SBC is unlikely to challenge another ILEC unless significant competition develops from other sources. Given the likelihood that SBC's out-of-region competition will be confined to the market segment that is already becoming competitive, and the uncertainty as to whether the merger is even necessary to induce SBC or Ameritech to compete out-of-region in that segment if they are otherwise motivated to do so to protect their large business customer base, SBC's claimed strategy is a thin reed on which to base approval of such a huge merger.

II. SBC'S ACQUISITION OF AMERITECH WILL EXPAND THE REACH OF A CORPORATE CULTURE THAT IS TOTALLY RESISTANT TO COMPETITION

Following SBC's acquisition of Pacific Telesis, all but 13 of PacTel's 35 top executives exercised their golden parachutes and left the company.[11] According to press reports, Ameritech's top five executives also have golden parachutes that would allow them to leave the company post-merger with very attractive financial packages.[12] Thus, if the merger is approved, it is more than likely that SBC's current management will control approximately 35% of the nation's local access lines and will oversee the provision of local telephone service in 13 states. In determining whether approval of the merger will serve the public interest, the Commission must take into account the demonstrated propensity of SBC's current management to fight and delay the entry of competitors into its existing monopoly markets. To the extent that SBC is able to expand the number of markets it controls through the acquisition of Ameritech, it will be able to expand the reach of its "stonewall" corporate culture to suppress the development of competition in a manner that completely frustrates the intent of Congress in passing the Telecommunications Act of 1996.

---

[11] Poling, "SBC, Ameritech Are Contrasts In Style," *The Orange County Register*, May 12, 1998, C3, 1998 WL 2627981 ("PacTel chairman and chief executive Phil Quigley stayed with the company just nine months after his company merged into SBC before leaving with his $10 million golden parachute.").

[12] *Id.*; Keller, "Growing Up: SBC Communications To Acquire Ameritech In a $55 Billion Deal," *The Wall Street Journal*, May 11, 1998, A1, 1998 WL-WSJ 3493498.

A. SBC's Attempts To Thwart The Development of Competition in Texas

In his affidavit filed in support of the merger application, Stephen Carter states that "SBC is committed from the highest levels of the company to open its local networks to enable others to enter the local exchange telecommunications markets in which SBC operates." Carter Affidavit at 3. Unfortunately, SBC's purported corporate "commitment" does not translate into an open entry policy in the real world as evidenced by the obstacles SBC has erected to constrain local competition in Texas. Level 3 itself has experienced resistance by SBC in Texas to its attempts to collocate. And other examples of SBC recalcitrance to market-opening measures have been noted by the Texas Commission and the federal courts. In light of this pattern of conduct, no weight should be accorded to Mr. Carter's statement.

We attach a copy of the Affidavit of Marybeth Schuh dated September 24, 1998, the original of which was attached to Level 3's comments filed September 25, 1998 in CC Docket 98-147. Paragraphs 9 and 10 of Ms. Schuh's Affidavit describe conduct by Southwestern Bell in Texas, designed to delay and obstruct physical collocation.

Level 3 has encountered similar delays and obstruction in attempting to opt into existing CLEC interconnection agreements with SBC. Level 3's experience is that it takes an average of a month before an agreement to opt into an existing agreement is filed by SBC with the State Commission. In addition, on one occasion SBC insisted that, before opting in, Level 3 agree with SBC's position on reciprocal compensation for calls to Internet service providers – even though that is an issue which is presently under litigation, and SBC has a statutory right to opt in without having to cede legal positions it has taken.

The SBC recalcitrance exhibited in these incidents has been officially noted by the federal courts. In a suit brought by Southwestern Bell Telephone Company ("SWBT") to challenge the Arbitration Award by the Texas Public Utility Commission ("PUC") in the first five arbitration petitions filed against it, the court ruled in favor of the defendants on each and every one of SWBT's claims for relief. The court also offered the following comments on SWBT's litigation tactics, which far more accurately describe its attitude toward competition than Mr. Carter's self-serving statements:

> The undersigned must note, however, that it was somewhat troubled by SWBT's tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and most, importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case -- over seven hundred pages in total -- could probably have been cut in half had SWBT *not fought tooth and nail for every single obviously non-meritorious point.* Suffice it to say that every conceivable objection SWBT could have raised to the interconnection agreements was, in fact, raised, here and fully briefed by all parties to the lawsuit. The Court has considered these arguments and has concluded that the arbitrated terms of the interconnection agreements fully comply with the requirements of §§ 251 and 252 of the FTA and that the PUC's decisions regarding those arbitrated terms did not involve a misinterpretation or misapplication of federal law and were not arbitrary and capricious.

Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., et al., No. A 97-CA-132 SS, Order, at 31 (W.D. Tex., August 31, 1998) (emphasis added).

In the meantime, SWBT filed its collocation tariff and revised cost studies and proposed permanent rates based on those studies. Although the PUC had stated in the Arbitration Award that "the adjustments in SWBT cost studies required by this Award will lower SWBT's proposed prices in all instances,"[13] SWBT's proposed permanent rates were higher in many instances than its original proposals. As a result, the parties were forced to file renewed arbitration petitions with the PUC. The PUC issued another Arbitration Award setting permanent rates and directing SWBT to revise its collocation tariff consistent with the terms of the Award. *Arbitration Award* in Docket Nos. 16189, *et al.* (Tex. PUC, December 7, 1998). SWBT filed suit in federal and state court against the PUC and the other parties to the arbitration seeking to vacate the Award and the orders approving the agreement. *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.* Civil Action No. A 98-CA-197 SS (W.D. Tex.); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, Cause No. 98-04970 (98th Judicial District Court of Travis County). Those cases are still pending.

When SWBT filed its draft Section 271 application with the PUC, carriers attempting to enter Texas local exchange market presented substantial evidence of the difficulties they regularly encountered in working with SWBT to interconnect their networks, purchase unbundled elements and provide resale. The testimony revealed SWBT's corporate policy of fighting CLECs "tooth and nail" on every conceivable issue,

---

[13] *Arbitration Award*, PUC Docket Nos. 16189, *et al.*, at ¶ 85 (Tex. PUC November 7, 1996).

even issues that the PUC had previously decided in favor of other CLECs. This evidence prompted the following comments from the Commissioners:

> Commissioner Walsh: The record is replete with examples of Southwestern Bell's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers and evidence of behavior which obstructs competitive entry.
>
> Commissioner Curran: Here we have a situation where potential competitors have spent enormous time and effort and probably enormous sums of money attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours in an effort to establish mechanisms under which the phone customers of Texas will have a choice in their local phone service, and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest, either on the part of consumers or on the part of potential competitors.
>
> Currently, there are CLECs with de minimis customers, and even those de minimis customers have been secured only with tremendous efforts and with Bell resisting at every turn. Will these CLECs and other CLECs be able to retain even this level of customer base into the future, much less to provide a real competitive alternative to additional subscribers? Under current practice, it is highly doubtful.

Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Project No. 16251, Tr. 187, 202, 203-204 (May 21, 1998).

SWBT's treatment of its competitors in Texas reflects SBC's propensity for resisting competition at every stage. For example, despite the fact that the PUC had ordered SWBT to tariff the rates, terms and conditions for physical collocation, SWBT had refused to allow CLECs who were not parties to the arbitration to purchase collocation out of the tariff. The only way such CLECs could take advantage of the tariffed terms and conditions was to opt-in to the interconnection agreement of one of the parties to the arbitration pursuant to Section 252(i) of the Act. When CLECs raised this issue during the hearings on SWBT's application for authority to enter the interLATA market, the PUC had to direct SWBT to make the collocation tariff available to any CLEC that wanted to physically collocate in SWBT's central offices. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 3 (Tex. PUC, June 3, 1998).

At the conclusion of the hearings on SWBT's draft 271 application, the PUC observed that "SWBT needs to change its corporate attitude and view [its competitors] as wholesale customers. . . . SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers. . . ." *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 2. The PUC's assessment of SWBT's corporate attitude toward competition, which was based on substantial evidence of SWBT's efforts to delay and restrain the entry of competitors into its monopoly local exchange market in Texas, cannot be reconciled with SBC's representations to this Commission of its open-armed embrace of competition and its purported efforts to enable competitive entry.

B. SBC's Takeover of PacTel Has increased Resistance to Competitive Access in California.

In his affidavit in support of the merger, Mr. Carter states that "SBC's record in opening its networks in the Southwestern Bell, Pacific Bell and Nevada Bell areas demonstrates SBC's commitment to its obligations under the 1996 Act. That has been the case with our merger with Pacific Telesis and there is no reason to expect it will be any different with Ameritech." (Carter Affidavit at 15.) As demonstrated above, SBC's record in opening its network in Southwestern Bell's territory reflects anything but a commitment to comply with its obligations under the Act. Moreover, since SBC acquired PacTel in April 1997, the infiltration of the SBC corporate culture has had a negative impact on Pacific Bell's attitude toward competition and consumer service in California. If, as Mr. Carter states, there is no reason to expect that things will be any different with Ameritech, the Commission should not approve the merger.

1. PacTel has adopted SBC's policy of resisting market-opening measures.

The same types of anticompetitive conduct that surfaced with respect to SWBT's operations in the Texas Section 271 proceeding have also been raised in connection with Pacific Bell's application to obtain interLATA authority in California.

Level 3 itself has experienced Pacific Bell's recalcitrance toward collocation applications since the SBC takeover. Paragraphs 3-6 of the attached Affidavit of Marybeth Schuh describe actions taken by Pacific Bell exhibiting an intent to forestall and delay collocation applications. In addition, Pacific Bell refused to allow Level 3 to opt in to its interconnection agreement with MFS on the ground that the reciprocal compensation rate was too high, even though Pacific Bell was continuing to operate with MFS under that agreement and Level 3 had a legal right to opt in.

Other examples of resistance to market-opening measures have been noted by the California Public Utilities Commission. For example, in its recent report on Pacific Bell's notice of intent to file for Section 271 authority in California, the Public Utilities Commission staff cited Pacific Bell for the misuse of customer proprietary network information ("CPNI") to maintain or win back customers that had chosen to switch carriers. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 26 (July 10, 1998). Only one month earlier, the Texas PUC had cited SWBT for the same infraction and had to direct SWBT not to use CPNI to win back customers lost to competitors. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 3. Clearly, SBC's improper use of CPNI to counteract its competitors' sales efforts does not evidence an intent to open its markets to competition.

In addition, the California staff noted the same recalcitrance with respect to collocation that Level 3 has experienced. Specifically, the staff noted a number of deficiencies in PacTel's provision (or more accurately, failure to provision) collocation space to its competitors, including Pacific Bell's denial of access to collocation in key central offices due to an alleged lack of space; failure to deliver collocation space on schedule; and ambiguous rules for the implementation of physical and virtual collocation that were subject to change unilaterally by Pacific Bell. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 37.

The California staff also found that as a condition of obtaining access to Pacific Bell's new OSS interfaces, CLECs were required to sign an OSS appendix that contained a number of unfavorable and questionable provisions. Among the offensive provisions were that CLECs would not be provided access to customer service records ("CSRs") until after the customer had agreed to switch carriers. This restriction clearly hampers the CLECs' ability to make effective sales proposals to customers by denying them access to vital information. Pacific Bell also reserved the right to modify or discontinue use of any OSS interface upon 90 days' prior written notice, a reservation which obviously introduces tremendous financial and operational uncertainty for CLECs. Finally, the OSS appendix required the signatory to agree that Pacific Bell "provides nondiscriminatory access to its OSS interfaces." The Staff appropriately expressed concern that Pacific Bell's insistence on these conditions constituted an abuse of market power. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 29-30. In the Texas proceeding, the PUC directed SWBT to either improve the preordering interfaces available to CLECs to provide sufficient access to customer information or show that CLECs have access to customer records at parity with the access SWBT enjoys. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 13.

Issues relating to compliance with the requirements of Section 252(i) of the Act were also raised against SBC's affiliates both in California and Texas. The California staff expressed concerns about Pacific Bell's refusal to comply with its obligations under Section 252(i) of the Act by making the terms and conditions of an interconnection agreement entered into with one paging company available to other paging companies and directed Pacific Bell to supply the reasons for its noncompliance. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 41. In the Texas Section 271 proceeding, the PUC directed SWBT to "establish that its interconnection agreements are binding and are available on a nondiscriminatory basis to all CLECs." *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 2.

2. <u>Consumer dissatisfaction with local service in California has grown under SBC's management</u>

Since SBC's acquisition of PacTel, numerous complaints have been filed relating to Pacific Bell's business practices and customer service policies. In an Order Instituting

Rulemaking released on June 18, 1998, the California Commission noted that formal and informal customer complaints about deteriorating telephone service had proliferated in the last year, prompting it to open an investigation on service quality standards. *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards For All Telecommunications Carriers and Revisions to General Order 133-B,* R.98-06-029 (Cal. PUC, June 18, 1998). SBC had assumed control of Pacific Bell just over a year before the release of the Commission's Order.

Pacific Bell's own employees recently filed a complaint with the California Commission alleging that SBC had implemented an aggressive, irresponsible and deceptive sales policy, emphasizing sales over service and customer satisfaction. *Telecommunications International Union, International Federation of Professional and Technical Engineers, AFL-CIO v. Pacific Bell and SBC,* filed June 18, 1998 with the California Public Utilities Commission.

The Utility Consumers Action Network ("UCAN"), a San Diego-based consumer watchdog group, has filed numerous complaints against Pacific Bell alleging that residential service has deteriorated significantly under SBC's stewardship. Examples of service deteriorations cited by UCAN include Pacific Bell's closure of public offices, which has a disproportionate impact on low income and elderly customers who use the offices to pay bills, reinstate service or interact on a face to face basis with Pacific Bell employees;[14] and Pacific Bell's allegedly deceptive and misleading marketing campaigns for Caller ID and related services.[15]

C. SBC caused PacTel to take an anti-competitive position on an issue where Ameritech took a pro-competitive position

AirTouch Communications, a wireless provider, provides a striking example of SBC's efforts to nullify Pacific Bell's pro-competitive undertakings after it took control. According to Comments filed with the Public Utilities Commission of Ohio,[16] Pacific Bell had informed AirTouch that it could purchase the billing and collection services needed to implement its Calling Party Pays ("CPP") program out of the Pacific Bell tariff. CPP is a billing option AirTouch offers to its wireless customers, pursuant to which the calling party, rather than the wireless customer, is billed for calls placed to wireless customers. By allowing wireless customers to avoid the charges for incoming calls, CPP reduces the cost of wireless service and makes it more economical for customers to leave their phones on at all times to receive incoming calls. The availability of CPP goes a long way toward making wireless service a substitute for, rather than merely a complement to, wireline service, thereby increasing the competitive choices accessible to consumers. An

---

[14] UCAN March 23, 1998 Protest of Pacific Bell Advice Letters 19291 and 19294 –Office Closures.

[15] *The Utility Consumers's Action Network v. Pacific Bell (U-1001-C)*, C. 98-04-004 (Cal. PUC, filed June 2, 1998).

[16] *Joint Application of SBC Communications, Inc., SBC Delaware, Inc. and Ameritech Ohio for Consent and Approval of a Transfer of Control*, Case No. 98-1082-TP-AMT, Comments of AirTouch Communications, filed September 4, 1998.

essential element for the deployment of CPP, however, is a billing and collection agreement with the incumbent LEC.

Prior to SBC's acquisition of Pacific Bell, AirTouch had negotiated a market trial for CPP in California pursuant to which Pacific Bell had agreed to provide a number of services, including billing and collection, necessary for implementation of the trial. Within weeks of SBC's acquisition, Pacific Bell stopped working with AirTouch and eventually told AirTouch that it was no longer interested in pursuing the market trial. SBC later informed AirTouch that it could not use Pacific Bell's tariffed billing and collection services to provide CPP. As a result, AirTouch was forced to file a complaint with the California Public Utilities Commission to compel Pacific Bell to honor the terms of its tariff.[17]

In the BellSouth Louisiana 271 decision, the Commission noted that while wireless providers are positioning their service offerings to become competitive with wireline service, they are still in the process of transitioning from a complementary service to a competitive equivalent to wireline service.[18] SBC's refusal to allow Pacific Bell to provide AirTouch the billing and collection services necessary to implement CPP is clearly designed to impede the development of wireless services as a commercial and competitive alternative to Pacific Bell's wireline service.

---

[17] AirTouch Comments at 7-8; *AirTouch Cellular v. Pacific Bell*, Case No. 97-12-044 (Cal. PUC, filed December 23, 1997).

[18] *Application of BellSouth Corporation, et al. Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in Louisiana*, 13 FCC Rcd 6245, at ¶73 (1998).

According to AirTouch, it currently has billing and collection agreements with Ameritech that allow it to offer CPP. If SBC's acquisition of Ameritech is approved, AirTouch should be rightfully fearful that its experience with Pacific Bell in blocking its ability to provide CPP will be repeated in the Ameritech states. SBC's use of its monopoly power to squelch competition is in significant contrast to the position taken by Ameritech on this important competitive issue, and is an illustration of the competitive harm that would ensue if the SBC management attitude takes over at Ameritech.

- - - - - - - - - - -

Unfortunately, SBC's "stonewall" corporate culture may achieve the desired effect of keeping some competitors away. Shortly after the merger was announced, the CEO of a Chicago-based CLEC explained that "[w]e're not in the SBC service area primarily because of the perception that they are one of the least open to competitive local service carriers."[19] It would be a clear detriment to competition to bring Ameritech's region under SBC's management philosophy. The Congressional goal of opening the telecommunications markets to competition and making available to consumers a choice of local telephone service providers would be realized more rapidly if new entrants could devote their resources to constructing networks, developing innovative products and marketing their services to customers rather than to litigating to obtain what they are entitled to under the Communications Act. The more local markets that SBC controls,

---

[19] "A Baby Bell Tolls for Ameritech: Tough SBC Will Cut Costs, Staff, Units," Crain's Chicago Business May 18, 1998 at 1, quoting Robert Taylor, CEO of Focal Communications Co.

the more money competitors will be forced to spend to enforce their rights to gain access to the incumbent's networks on reasonable and nondiscriminatory terms.

III. THE MERGER WILL ELIMINATE SIGNIFICANT POTENTIAL COMPETITION IN THE ST. LOUIS MARKET, AND RAISES MATERIAL FACTUAL ISSUES WITH RESPECT TO OTHER MARKETS.

A. St. Louis

It is conceded that, before the merger was announced, Ameritech entered the St. Louis market as a CLEC, offering resold local service to its existing cellular customers. The merger will eliminate Ameritech as a competitor with SBC in the St. Louis area.

SBC argues that Ameritech was not a significant competitor in St. Louis, because its effort was designed only to protect its cellular business against erosion by wireless competitors offering bundled wireless and local exchange service. Brief at 70-72.

However, Ameritech had a more expansive view when it initially announced its market entry in St. Louis. It stated that "St. Louis is one of the nation's great markets, and this expansion represents a tremendous opportunity for Ameritech to grow through competition." The company was optimistic about its prospects in St. Louis, explaining that "[t]he Ameritech brand is already strong there, as evidenced by our superior customer growth in cellular and paging."[20]

---

[20] "Ameritech to Expand in St. Louis," Ameritech Press Release (Nov. 6, 1997). Http://www.ameritech.com/media/releases/release-1254.html (visited September 1, 1998). Ameritech also described its plans in its 10-K filed March 13, 1998: "Now that we have approval from the Missouri public service commission, we plan to offer local and long distance phone service to residential customers in the St. Louis metropolitan area in early 1998. . . . Our offerings in the St. Louis market will include local phone, long distance, cellular, paging and wireless data services. Customers will have the option of a consolidated bill." Ameritech Corp., Form 10-K, Item 1 "Business," "Landline

Since Ameritech has already entered the St. Louis market, it is doubtful whether it is necessary to apply the tests of the potential competition doctrine to conclude that elimination of Ameritech from that market harms competition. Nevertheless, application of that test confirms that its elimination from the market is anticompetitive.

The five elements of the potential competition doctrine, as summarized in *Bell Atlantic/NYNEX*, ¶ 138, are fulfilled by Ameritech's entry into the local exchange market in St. Louis:

1. The local exchange market in St. Louis is "highly concentrated" (as required by the first element). Id. No one disputes that fact.

2. The second element requires that "few other potential entrants are 'equivalent' to the company that proposes to enter the target market by merger." Id. SBC argues that there are two other significant competitors in St. Louis: AT&T/TCG/TCI and MCI/WorldCom. SBC Brief at 72. Even if that were true, the potential competition doctrine would still regard Ameritch as significant. In *Bell Atlantic/NYNEX*, the Commission found that the merger would have anticompetitive effects because it would eliminate "one of just four new significant market participants." Id. at ¶ 108. Moreover, Ameritech appears to have been "the 'second choice' alternative for a significant number

---

Communications Services."

of customers," id., since it had a large customer base[21] and was one of the top two telecommunications brand names in the market, along with AT&T.[22]

3. The third element requires that "the company entering the target market by merger was reasonably likely to have entered the market but for the proposed merger." Id. Here Ameritech did enter the market before the merger. And while it now says that the entry was "limited," Ameritech's initial statements upon entering the market, as well as its high brand-name recognition and large base of existing customers, indicate otherwise.

4. The fourth element requires that the company seeking to enter the market through merger "had other feasible means of entry." Id. Ameritech obviously thought it had "other feasible means of entry," since it actually did enter the market through means other than merger. And while it now denigrates its prospects in that market, the Commission is not bound by "subjective statements of company officials" concerning their entry plans, particularly when those statements are contradicted by actions the company took before the merger was announced. *Bell Atlantic-NYNEX*, ¶ 75 and note

---

[21] Ameritech had 250,000 to 300,000 wireless subscribers in the St. Louis metropolitan area, or about 10% of the overall population of 2.5 million. "Spirit of St. Louis Haunts SBC-Ameritech Merger Plan," 6/8/98 Wall Street Journal B4. The President of Ameritech Cellular predicted that "the majority of our base of customers will come over to this product." Id.

[22] Ameritech research is reported to have shown that Ameritech is one of the "top two" telecommunications brand names in St. Louis, along with AT&T. "Spirit of St. Louis Haunts SBC-Ameritech Merger Plan," 6/8/98 Wall Street Journal B4.

166, quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring).

5. The final element requires that the alternative means of entry "offer a substantial likelihood of ultimately producing de-concentration in the target market or other significant pro-competitive effects." *Bell Atlantic-NYNEX*, ¶ 138. SBC now minimizes Ameritech's chances of success. But Ameritech thought its prospects were good when it entered, based on its significant existing customer base and its high brand-name recognition. In addition, Ameritech possesses the managerial experience and technical expertise which the Commission has deemed important in assessing the significance of potential competition in the local exchange market. Id., ¶ 107.

In an attempt to denigrate the prospects of its St. Louis market entry, SBC argues that Ameritech Cellular was encountering initial problems in providing local service to its St. Louis cellular subscribers. Brief at 71-72. SBC lists these problems as: 1) a confusing billing format, 2) a pricing plan which provided value to some customers but not others, 3) increased competitive pressure on rates, and 4) order processing errors. Osland Aff't ¶ 8.

But getting the right billing format and devising the right pricing plan would appear to be typical and resolvable start-up problems, as does the resolution of order processing errors. Increased competitive pressure on rates may have been a more serious problem, but without more information the Commission cannot conclude that this factor would have stopped Ameritech from going forward, had the merger not been proposed.

SBC's self-serving pessimistic assessment, concerning a project that was only put on hold after the merger was announced, is not credible.

Finally, SBC argues that even if Ameritech is a significant potential competitor in St. Louis, if Ameritech Cellular is sold in connection with the merger, the purchaser will inherit its customer base and network and thus step into Ameritech's shoes as a significant competitor. Brief at 73. But the purchaser will not (unless it is AT&T) inherit a brand name widely recognized in St. Louis; nor will it inherit Ameritech's cadre of managerial and technical personnel with years of experience in providing local service. Thus the purchaser will not be in nearly as strong a position as Ameritech now is to compete in the St. Louis market.

B. Other Markets

While the details of Ameritech's efforts to provide competitive services in St. Louis are relatively well documented, the Commission should not overlook other areas in which the companies appear to have considered competitive entry into each other's markets. Ameritech's CLEC subsidiary, for example, is already certificated to provide service in California, and it has an interconnection agreement with SBC's Pacific Bell subsidiary there. Similarly, Ameritech's CLEC unit is authorized to offer competitive local exchange service in Texas – where, again, it has an interconnection agreement in place with SBC's Southwestern Bell incumbent subsidiary. Although it appears that the

Ameritech entities have not initiated service in those states, it is not unheard of in the competitive telecommunications industry – with all of the implementation issues that need to be addressed – for carriers to hold certificates for a year or more before service actually begins.[23] Thus, the absence of any service offerings at this point should not necessarily be construed as representative of an internal corporate decision to halt competitive entry.

Moreover, the very fact that Ameritech has obtained certification and entered into interconnection arrangements with SBC in two states brings it farther along the continuum of competitive entry than Bell Atlantic was in New York prior to the merger with NYNEX. Yet the Commission concluded in *Bell Atlantic/NYNEX* that Bell Atlantic was a "precluded competitor and among the most significant market participants" in the New York local exchange, exchange access, and long distance markets even though Bell Atlantic had not taken any public or regulatory steps to enter the New York market.[24] In fact, the Commission's conclusion was based primarily upon a review of internal Bell Atlantic documents that indicated that the company "was actively seeking" to enter New York.[25] Since Ameritech's efforts in California and Texas demonstrate a much higher

---

[23] Indeed, according to a January 1998 press report announcing the California interconnection agreement, Ameritech "has been working since the enactment of the 1996 Telecommunications Act to offer service wherever its major in-region corporate customers have operations." *Pacific Bell is Latest in Ameritech's CLEC Drive*, TeleCompetition Report (Jan. 15, 1998).

[24] *Bell Atlantic/NYNEX*, at ¶ 73.

[25] *Id.*

level of activity than Bell Atlantic's internal deliberations with respect to New York, the Commission should carefully consider the questions of material fact presented by Ameritech's activities and, as discussed below, engage in the same kind of review of internal corporate documents in order to understand how far along the company was in "actively seeking" to enter SBC markets.[26]

SBC claims that it considered and rejected entry into the local exchange market in Chicago, based on its claimed unsuccessful foray into Rochester, New York. Brief at 67-70. However, as the Commission as noted, it is not "bound by subjective statements of company officials that they have no intention of making a de novo entry." *Bell Atlantic/NYNEX.* ¶ 75 n. 166, quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring). SBC has a recognized brand name ("Cellular One") in Chicago and a customer base through its cellular service. Through its long experience in providing local exchange service in its home region, it has the managerial and technical expertise to enter the local exchange market outside its home regions. And it clearly has significant financial resources, even without the merger. These are all the ingredients for successful entry into the local exchange market. *See Bell*

---

[26] As part of this review of internal corporate documents, the Commission should also examine SBC's long-distance entry into Chicago and Central Illinois. A December 1996 SBC press release touted this offering as "another step closer to its 'one stop-shopping' strategy," which would combine long-distance services with wireless local service offered by SBC's Cellular One affiliate. This SBC statement indicates that the company hoped – and was taking active steps – to tap into the local exchange market and long-distance markets in Ameritech's home region. *SBC Communications Introduces its First Landline Long-Distance Service in Chicago, Boston, Washington, D.C., Baltimore, Upstate New York, Central Illinois*, Press Release (Dec. 2, 1996).

Atlantic/NYNEX ¶ ¶ 106, 107. Rather than accept SBC's say-so, the Commission should, at a minimum, inspect the Hart-Scott Rodino documents to determine the actual status of SBC's intentions prior to the merger regarding out-of-region competition, and hold a hearing to probe more deeply into the issue of SBC's and Ameritech's corporate intent prior to the merger regarding out-of-region competition.

The prospect of two large Bell Companies (one of whom is already the product of two dominant incumbent mergers) combining their substantial access lines and monopoly market shares is a serious matter that merits more attention than consideration through pleadings back and forth between interested parties. A hearing would be particularly helpful in developing a sound factual record and more closely analyzing the internal SBC and Ameritech strategies associated with their individual decisions to enter (and their apparent decisions to cancel competitive entry into) each other's markets.

As the Commission noted in *Bell Atlantic/NYNEX,* in considering whether two companies may have been actual potential competitors of one another, it is not "bound by subjective statements of company officials that they have no intention of making a de novo entry. . . . [T]he decision whether the acquiring firm is an actual potential competitor is, in the last analysis, an independent one to be made by the trial court [or the FCC in this case] on the basis of all relevant evidence properly weighed according to its credibility."[27] Questions of corporate intentions and capabilities are at the core of the

---

[27] *Id.*, at ¶ 75, n. 166 (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring)).

potential competition issues in this case, and these issues go beyond the issues of economic analysis that might be appropriate for consideration on the papers. Given the severe competitive concerns at issue in their proposal and the substantial questions of material fact they present, SBC and Ameritech should be required to provide a detailed explanation of their public interest arguments, with appropriate opportunity for presentation and examination of the witnesses who have submitted sworn statements in support of this proposed merger.

IV. CONDITIONS TO MERGER APPROVAL WILL NOT BE EFFECTIVE TO ALLEVIATE ANTI-COMPETITIVE EFFECTS, UNLESS THE PARTIES ARE COMMITTED TO A STRUCTURAL SOLUTION REMOVING THE MERGED COMPANY'S INCENTIVE AND ABILITY TO DENY COMPETITIVE ACCESS TO LOCAL LOOPS.

A. Conditions are not an effective means of resolving the anticompetitive concerns raised by this merger.

The severe competitive concerns raised by creating a company controlling a third of all the access lines in the country are unlikely to be resolved by approving the merger subject to conditions. For example, conditions cannot address the effect of the merger in stifling any incentive on the part of either company to compete in each other's region. And if the Bell Atlantic / GTE merger is also approved, there is no set of conditions that can remove the incentive the two giant companies would have not to compete with each other, out of fear of the consequences of retaliation. And conditions cannot address the problem of raised by spreading the reach of SBC's "stonewall" corporate culture into Ameritech's region.

Moreover, there is considerable question whether merger conditions would prove to be enforceable. For example, there are already charges that the Bell Atlantic/NYNEX merger conditions have not been complied with. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[28] Once the merger is consummated, it will be impossible to undo as a practical matter. And given the enormous stake the combined company will have in preserving its within-region local exchange monopoly, it will be motivated to violate the conditions for as long as possible, even if compliance orders and fines result.

B. The only way to assure that the merger is consistent with local exchange competition is not to approve it unless the parties are committed to a structural solution removing their incentive and ability to obstruct competitive access to local loops.

In its comments filed March 23, 1998 on the Petition of LCI Telecom Corp. for Declaratory Rulings (CC Docket 98-5), Level 3 pointed out that the anticompetitive nature of local exchange markets – which this merger will exacerbate – is unlikely to resolved without a structural solution that isolates the BOCs from control of the

---

[28] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

bottleneck loops. Level 3 urged the Commission to explore alternative approaches that would effectively separate control of the loop from the BOCs' competitive interests, so that there would be no incentive to limit competitive access to these facilities or to price them in a discriminatory or strategic manner. Level 3 proposed a solution involving divestiture of local loops to an independent company (the "LoopCo" proposal), discussed the alternative of an independent company operating but not owning the loops (the "Independent System Operator" concept), and pointed out that other parties, including the BOCs, might have other suggestions worthy of consideration.

This merger presents a particularly strong case for putting any consideration of approval on hold until the parties are committed to a structural solution. The history of SBC's obstruction of competitive network access underlines the inadequacies of non-structural solutions, which inevitably require extensive and intrusive government oversight of the operation of the regulated company's business. This oversight, as a practical matter, can never be really effective (particularly where the regulated company is dedicated to obstruction), because of budgetary constraints, plus the obvious fact that it is impossible for any regulator to understand a company's business as well as the company itself does. Before taking a step that will drastically increase the concentration of monopoly power in the local telephone market, the Commission should consider structural solutions that would effectively resolve the issue of bottleneck control over the local loop, paving the way for the parties to merge in a manner consistent with competition in the local exchange market.

V. IF THE COMMISSION ULTIMATELY APPROVES THE MERGER WITHOUT A STRUCTURAL SOLUTION, APPROVAL SHOULD BE CONTINGENT ON STRINGENT MARKET-OPENING CONDITIONS AND EFFECTIVE SANCTIONS FOR FAILURE TO MEET THOSE CONDITIONS.

1. If the Commission nevertheless approves this merger without resolving the structural problem, it should consider the Bell Atlantic/NYNEX merger conditions as no more than a floor for guarding against competitive harms. The Commission should supplement these conditions to ensure that the new SBC/Ameritech cannot use its combined size and market power to discriminate against smaller local exchange competitors.

The Commission should require to the new SBC/Ameritech to commit to providing greater discounts on resold services and prices for unbundled network elements that truly comply with the methodology set forth in the *Local Competition Order*.

In addition, the Commission should require the new SBC/Ameritech, if it applies for in-region interLATA authority following the merger, to demonstrate that effective competition (as that term may be embodied in the competitive checklist) exists *throughout its entire region*, rather than looking at any one state. Such a condition would provide much-needed safeguards against an abuse of market power by this new local exchange service giant, and furnish the additional incentives necessary to induce the combined company to take steps in opening all of its markets to competition.

The Commission should also require the new SBC/Ameritech to provide technically feasible combinations of network elements at forward-looking cost-based rates. The widespread RBOC intransigence in providing network element combinations has no basis in technology or in economics, and is merely a roadblock the RBOCs have created out of a legal fiction to limit competitive entry. As a step toward ensuring that the market is open to competitors, SBC-Ameritech should commit to eliminate this patently arbitrary and discriminatory prohibition on combinations throughout its combined region.

The Commission should also require SBC/Ameritech to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the Bell Atlantic-NYNEX merger.[29] Since the new SBC/Ameritech would already be compiling data on a monthly basis under the basic Bell Atlantic/NYNEX conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed SBC/Ameritech company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

More stringent reporting requirements, however, are only a means to an end. Reports allow carriers to measure performance, but they cannot prevent SBC/Ameritech from acting in a discriminatory and anticompetitive manner. The Commission should attach conditions compelling the combined SBC/Ameritech to adhere to certain levels of performance in providing competitors with access to unbundled network elements and

---

[29] *See Bell Atlantic/NYNEX*, at App. C.1.d.

resold services. For each reporting category imposed, SBC/Ameritech should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when the mega-ILEC is performing in a substandard manner.

While we recognize that the Commission tentatively concluded in its Operations Support Systems rulemaking that it would be "premature" to develop performance standards,[30] it would only be through the adoption of such standards that the reporting requirements can truly provide competitors with certainty in analyzing the relative performance of SBC-Ameritech. Where the Commission feels that there is insufficient information to develop reasoned performance standards for a particular reporting category, the Commission should require the combined SBC/Ameritech to clearly identify the performance levels and intervals it would provide for itself, and adopt those as default performance standards.[31]

2. The Commission should also ensure that the combined SBC/Ameritech cannot evade compliance with these merger conditions, as Bell Atlantic/NYNEX has apparently done.

---

[30] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

[31] The Commission should also require periodic independent third-party verification of SBC/Ameritech's OSS to better ensure that performance will be satisfactory going forward.

It will be practically impossible, of course, to undo the merger once it has been completed (although that might be the only effective sanction). Instead, the Commission should establish a system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions.

For example, if SBC/Ameritech's performance vis-a-vis a CLEC in any category in which it is required to report falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of $75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis. In the Southwestern Bell-AT&T interconnection agreement in Texas, Southwestern Bell has already agreed to pay liquidated damages of between $25,000 and $75,000 in cases where Southwestern Bell's performance falls below a certain measurement level for two consecutive months.[32] Adopting a performance penalty on the high end of that range in the present context would help ensure that there are adequate disincentives to deter the larger, richer, more powerful combined SBC/Ameritech from engaging in anticompetitive conduct.

---

[32] Interconnection Agreement-Texas between Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc., Atch. 17, section 1.1.4.3.

CONCLUSION

The application for a transfer of control should be denied.

Respectfully submitted,

Terence J. Ferguson /su

Terence J. Ferguson
Senior Vice President and Special Counsel
Level 3 Communications, Inc.
3555 Farnum Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel.)
(402) 536-3645 (Fax)

October 15, 1998

255305.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket 98-147
Advanced Telecommunications Capability	)	

AFFIDAVIT OF MARYBETH SCHUH ON BEHALF OF LEVEL 3 COMMUNICATIONS, INC.

1. My name is Marybeth Schuh. I am Manager of Collocation for Level 3 Communications, LLC. I am responsible for obtaining all of Level 3's collocation applications and arrangements.

2. The purpose of this affidavit is to provide the Commission with information regarding the collocation practices of incumbent local exchange carriers ("ILECs") that are delaying Level 3's entry into competitive markets and Level 3's deployment of advanced services. Because Level 3 continues to apply and negotiate for collocation with numerous ILECs, Level 3 does not specify which ILEC has engaged in the delaying tactics described herein.

<u>ILEC A</u>

3. Initially, ILEC A would not accept our collocation applications without an interconnection agreement. They accepted our applications only after Level 3, applying as a competitive access provider ("CAP"), rather than a competitive local exchange carrier ("CLEC"), agreed to pay 100% of the non-recurring charges up front. This resulted in a one week delay.

4. ILEC A returned our initial payment because the checks were issued by Kiewit Diversified Group and not Level 3 (the name which appeared on our applications).

This resulted in a 2 week delay.

5. Quotes for 2 applications for Virtual Collocation (where Level 3 was denied physical space) were months late and reflected a cost which far exceeded the cost to buildout a physical cage. This resulted in a 3 month delay.

6. ILEC A has inventoried its central offices for additional collocation space and has released this information (# of cages available and when) to all of their CLEC customers. This led to a flood of collocation applications to which ILEC A is not providing timely responses. ILEC A is permitting some companies to exercise the first right of refusal (where the company was previously denied physical collocation for that premise) before responding to other CLECs. Of 10 Physical Collocation applications Level 3 submitted on August 28, 1998, as of September 24, 1998, only 3 have been confirmed by ILEC A as having available space.

ILEC B

7. ILEC B would not accept our collocation applications in one state without an interconnection agreement approved by the Commission. Our applications were finally accepted after our interconnection agreement was approved, resulting in a 22 week delay.

8. Initially, ILEC B would not accept our collocation applications in a second state without an interconnection agreement approved by the Commission. After escalating to the General Manager of Wholesale Local Markets, ILEC B agreed to accept our applications for that state under an interim tariff. This resulted in an 8 week delay.

9. ILEC C took 10 weeks to respond to our physical collocation applications with quotes. This response was 5 weeks beyond the specified deadline.

ILEC C

10. ILEC C would not give us a copy of their new State Collocation Tariff, which became effective in April 1998, even though they were quoting us rates from it. Our on-line Tariff service did not have a copy of the new Tariff until the end of May as they were waiting for the official release. This resulted in a 1 week delay.

ILEC D

11. ILEC D delayed approval of MOP documents (Method of Procedure) in order for our vendors to perform work on our physical collocations, resulting in a 4 week delay.

ILEC E

12. ILEC E had denied several of Level 3's physical collocation applications in central offices ("COs") which were not proven to the State Commission to be exhausted. After calls to the State Commission and a mildly threatening letter to ILEC E, physical space was "uncovered" in some of those COs. To date, Level 3 has only virtual collocation build-outs in progress and ILEC E has provided firm due dates for completion of a physical cage within only one CO.

13. When ILEC E confirms receipt of physical collocation applications via letter, they state that more information (*i.e.* cage turnover dates) will be provided within a 10-day period. This timeframe is seldom met.

ILEC F

14. ILEC F uses a host of different vendors to construct physical collocation arrangements which has led to delays in cage turnover averaging 4 weeks.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Marybeth Schuh
Manager of Collocation

Level 3 Communications, LLC

Dated: 9/24/93

CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on October 15, 1998, a true copy of **Comments of Level 3 Communications, Inc. In Opposition to Application For Transfer of Control** was served on the following people via United States Postal Service first-class mail, postage pre-paid:

Patrick J. Grant
Norman Sinel
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
Counsel for SBC Communications, Inc.

Antoinette Cook Bush
Skadden, Arps, Slate, Meager & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
Counsel for Ameritech Corporation

Magalie Roman Salas* (orig. and 12)
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

International Transcription Service, Inc.*
Attn: Duplicating Contractor
1231 20th Street, N.W.
Washington, D.C. 20036

Chief, (2 copies)*
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Chief* (2 copies)
International Bureau
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Jeanine Poltronieri*
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Chief* (1 copy)
Commercial Wireless Division
2100 M Street, N.W.
Room 7023
Washington, D.C. 20554

Radhika Karmarke*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Lynn Starr
Executive Director, Federal Regulations
Ameritech Corporation
1401 H Street, N.W., Suite 1020
Washington, D.C. 20005

Janice Miles*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Lisa Choi*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Bill Dever*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Wayne Watts
General Attorney and Assistant General Counsel
SBC Communications, Inc.
175 East Houston
San Antonio, TX 78205

Cecilia Stephens (w/diskette)*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Teri Lee Amaya
Teri Lee Amaya